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No. 08-367

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ISLANDER EAST PIPELINE COMPANY, L.L.C.
Petitioner,

v.

GINA MCCARTHY, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
AND
STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF AMICUS CURIAE THE COUNTY OF SUFFOLK, NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Statement of Identity of *Amicus Curiae*, Interest in Case

Amicus Curiae in this matter is the County of Suffolk ("Suffolk"), a political subdivision of the State of New York, located on the eastern portion of Long Island. Suffolk is one of the twelve original counties of New York State and comprises 1000 square miles of the eastern two-thirds of Long Island, extending approximately 95 miles from its western border to the eastern tip of Long Island. Suffolk is bounded on the south by the Atlantic Ocean and on the north by Long Island Sound. At Suffolk County's widest point, the distance from Long Island Sound to the southern shore is 26 miles.

The Suffolk County Charter providing for self-government, was first adopted by the New York State Legislature in 1958 (c. 278, L. 1958) and was ratified by Suffolk County voters in 1960. In 1970, Suffolk County changed its governing body from a Board of Supervisors to a County Legislature, consisting of eighteen legislators, with a County Executive elected at large. Suffolk County Charter §§ C2-1, C2-3, & C3-1.

Suffolk is interested in this case because the proposed pipeline will bring significant environmental, economic, and operational benefits to Suffolk, Long Island, and its surrounding regions.

The authority of the Suffolk to file this *Amicus Curiae* brief is derived from Rule 37.2 of the Supreme Court Rules, as all parties to this matter have consented to the filing of this brief. Their consents have been filed with this Court.

Argument

The Connecticut Department of Environmental Protection ("CTDEP") denied the water quality certification required under § 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), to applicant Islander East Pipeline Company, L.L.C. ("Islander East") for a proposed interstate natural gas pipeline project that will supply natural gas to growing energy markets Long Island, New York, New York City, and Connecticut. Upon information and belief, Long Island is expected to receive, at least initially, most of the natural gas generated by the project. Although Islander East has received final authorization from the Federal Energy Regulatory Commission ("FERC") for the pipeline, the CTDEP's § 401 certification is a prerequisite to its construction of the proposed pipeline. 33 U.S.C. § 1341; *see also Islander East Pipeline Co., LLC v. McCarthy,* 525 F.3d 141, 144 (2d Cir. 2008).

In addition to the Clean Water Act, the Natural Gas Act of 1938 is also applicable to this matter. *Id.*, 525 F.3d at 143. The Natural Gas Act requires that "any party seeking to construct . . . a facility for the transportation or sale of natural gas in interstate commerce must secure 'a certificate of public convenience and necessity' from FERC." *Id.*; 15 U.S.C. § 717f(c)(1)(A). "Congress placed authority regarding the location of interstate pipelines. . .in the FERC, a federal body that can make choices in the interests of energy consumers nationally." *National Fuel Gas Supply Corp. v. Pub. Serv. Comm'n,* 894 F.2d 571, 579 (2d Cir. 1990).

This case raises an important question about whether a state agency in one state may use its power to grant or deny water quality certifications under § 401 of the Clean Water Act in an arbitrary manner to block an interstate pipeline that has received a FERC certificate to serve the pressing energy needs of another state. Congress amended the Natural Gas Act in 2005 to provide federal courts of appeal with the power to review and remand decisions by state agencies that use the powers granted to them by federal laws like the Clean Water Act to block interstate pipelines when an agency decision, like CTDEP's, is inconsistent with federal law. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 313(b). CTDEP's denial has a direct and serious impact on Suffolk, and Suffolk urges this Court to grant Islander East's petition for certiorari to make it clear that CTDEP's actions are inconsistent with federal law and should be reversed.

The proposed Islander East pipeline is a 44.8 mile long, 24-inch wide pipeline that will interconnect with an existing pipeline in Connecticut and transport much needed natural gas to Suffolk County, New York, crossing 22.6 miles the Long Island Sound *en route*. *Islander East*, 525 F.3d at 146. The pipeline will bring significant economic and operational benefits to these regions, including increased gas supply alternatives and competition. Additionally, the Islander East pipeline will help the environment by improving air quality though the greater use of natural gas in electric power generation.

The proposed Islander East pipeline will fully integrate the natural gas transmission systems between New England and New York, enhancing

access to virtually every major supply basin in North America, and securing a dependable supply of energy from diverse sources.

The Islander East pipeline is a cost-effective and energy-efficient way to deliver much needed natural gas to the Connecticut, Long Island, and New York City markets.

Demand for natural gas is growing at a greater rate in these markets than anywhere else in the Country, and the demand for natural gas is expected to continue to grow as more homes convert to natural gas and more natural gas-fired plants are built to generate electricity for these regions. Even with implementation of energy conservation measures, demand for natural gas on Long Island has been growing at the rate of eight percent a year, well above the national average.

With nearly three-quarters of all new Long Island homes being built for natural gas, this demand will continue to rise.

Planning also is underway for two natural gas generating plants in Suffolk County, which would use gas supplied by the Islander East pipeline. New supplies can also be used by older, existing facilities in the area that are expected to convert to natural gas in the near future.

The New York Independent System Operator, a not-for-profit corporation that administers New York State's wholesale energy market, has determined that Long Island, due to its unique geography, must have

98 percent of its peak demand located "on island" to ensure reliable supplies. Therefore, it is clear that Long Island's unique geography demands a home-based energy supply and the generating facilities need natural gas to operate.

The Islander East pipeline will deliver high-pressure natural gas to meet the load from new, efficient, gas-fired electric generating plants as well as from the older, existing facilities that may convert to natural gas, and the pipeline will supply enough natural gas to heat 600,000 homes and meet local distribution company growth.

Natural gas is a clean and affordable way to heat homes, businesses, and fuel power plants. As the cleanest burning fossil fuel, natural gas promotes air and water quality when used in place of other fossil energy sources. When natural gas is burned, virtually no atmospheric emissions of sulfur dioxide or small particulate matter are released and the amount of nitrogen oxide produced is significantly less than other fuels.

Increased use of natural gas can help address environmental concerns by reducing air emissions, making natural gas the environmental fossil fuel of choice. Studies show a significant reduction of sulfur dioxide emissions as a result of the clean generation of electricity on Long Island by the gas Islander East will provide.[1] The reduction will be roughly 800-

[1] Sulfur dioxide, also known as SO2, causes a wide variety of health and environmental impacts because of the way it reacts with other substances in the air. Particularly sensitive groups include people with asthma who are active outdoors and children, the elderly, and people with heart or lung

400,000 tons, which translates into a reduction of nitrogen oxides emissions by approximately 10,000-31,500 tons, depending on the actual amount of new combined cycle generation built on Long Island.[2]

It is vitally important to Suffolk that pipelines such as this be constructed and maintained, despite the State of Connecticut's arbitrary and capricious denial of the needed Clean Water Act/water quality certification of the project.

To that end, Suffolk urges this Court to grant Islander East's petition for certiorari, and to make it clear that, when an agency's Clean Water Act decision would thwart the jurisdiction and power of FERC to permit natural gas pipelines, the legality of that decision must be determined in light of two laws—the Clean Water Act and the Natural Gas Act. These laws must be read together, in tandem, to ensure that one state does not set arbitrary standards to block projects like Islander East for reasons that are inconsistent with both the Clean Water Act and Natural Gas Act, and which prevent FERC from properly administering the Natural Gas Act in the interests of consumers nationwide. This Court should

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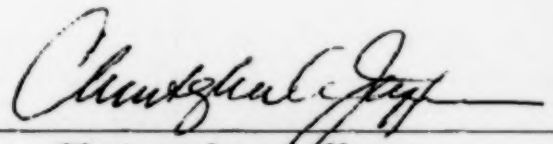
disease. www.epa.gov/air/urbanair/so2/hlth1.html (last updated May 9, 2008). Particularly sensitive groups include people with asthma who are active outdoors and children, the elderly, and people with heart or lung disease. *Id.*; *Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1154-1155 (6th Cir. 1978).

[2] Nitrogen oxide, also known as NOx, is the generic term for a group of highly reactive gases, all of which contain nitrogen and oxygen in varying amounts. Many of the nitrogen oxides are colorless and odorless. However, one common pollutant, nitrogen dioxide, along with particles in the air can often be seen as a reddish-brown layer over many urban areas. www.epa.gov/air/urbanair/nox/ (last updated May 9, 2008); *Alaska Dep't of Envir. Conser. v. EPA*, 540 U.S. 461, 470 (2004) (footnote 1).

grant certiorari to explain that state agencies cannot interpret their power under Clean Water Act is such a broad fashion that they undermine the power that Congress gave FERC to certificate needed pipelines and determine their route and construction methods.

Conclusion

Based upon the above, *Amicus* County of Suffolk urges the Court to grant the Petition for a Writ of Certiorari of Islander East Pipeline Company, L.L.C. in this matter.



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CERTIFICATE OF COMPLIANCE

No. 08-367

Islander East Pipeline Company, L.L.C.,

Petitioner,

v.

Gina McCarthy, Commissioner of the State of Connecticut
Department of Environmental Protection

and

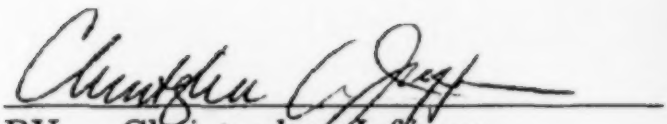
State of Connecticut Department of Environmental Protection,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Brief of Amicus Curiae the County of Suffolk, New York in Support of the Petition for a Writ of Certiorari contains 1,766 words, not excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 21, 2008



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